ORHAN OLMEZ

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CRIMINAL REVISION NO. CR 53-3 OF 1987]
19 FEBRUARY 1987

CRIMINAL LAW AND PROCEDURE: *Extradition - Diplomatic immunity waiver - Whether subpoena can be issued against a diplomat who has waived immunity - Whether warrant of arrest can be issued if he fails to attend - Extradition Ordinance 1958 - Criminal Procedure Code - Section 323 - Schedule to the Diplomatic Privileges (Vienna Convention) Act 1966 - Articles 2, 29.*

On 21 July 1981 requisition was made by the Republic of Turkey to extradite Orhan Olmez, the fugitive criminal, back to the Republic. The fugitive criminal was arrested on 28 July 1986 and extradition proceedings commenced in the Magistrate's Court in Kuala Lumpur. On 20 December 1986 the first secretary to the Turkish embassy in Kuala Lumpur Mr. Tarik Yelvac gave evidence. During cross-examination by defence Counsel there were was some confusion about the translation of certain documents.

The matter was adjourned to 21 January 1987. On that day Mr.Yelvac did not turn up. A note was sent by the Turkish embassy that Mr. Yelvac would not be attending Court any more. Defence Counsel applied for a warrant of arrest to be issued against Mr.Yelvac. The Magistrate held that a warrant of arrest could not be issued by virtue of Article 29 as contained in the Schedule to the Diplomatic Privileges (Vienna Convention) Act 1966. The Defence Counsel applied to this Court to exercise its power of revision under s. 323 of the Criminal Procedure Code to order a warrant of arrest against Mr.Yelvac.

Held:

[1] Article 29 guarantees that the person of a diplomatic agent shall be inviolable. He is not liable to any form of arrest or detention. Article 2 provides that a diplomatic agent is not obliged to give evidence as a witness in our Courts or in any tribunal.

[2] The immunity including immunity from giving evidence as a witness however may be expressly waived by the sending state as provided in Article 32.

[3] It follows that since there is an express waiver, Mr. Yelvac is obliged to attend Court and continue to give evidence as a witness in the extradition proceedings. Therefore the Magistrate can issue a subpoena to compel Mr. Yelvac's attendance in Court. If he fails to attend, a warrant of arrest should then be issued against him.

Case referred to:
Tungku Abu Bakar & Ors. v. Sultan of Johor [1949] 15 MLJ 187; [1950] 16 MLJ 3; [1952] AC 318

Legislation referred to:
Criminal Procedure Code, ss. 323, 425
Diplomatic Privileges (Vienna Convention) Act 1966, arts. 1, 9(1), 29, 31(1), (2), 32
Evidence Act 1950, s. 138(1)
Extradition Ordinance 1958, ss. 3A, 10

Other sources referred to:
Mallal's Criminal Procedure, 4th Edn., p. 597
A Diplomat's Handbook of International Law and Practice, 2nd Edn., p. 126

For the fugitive criminal - Karpal Singh; M/s. Karpal Singh & Co.
For the public prosecutor - John O'Hara, DPP (Lee with him)

[Editor's Note: The judgment of the Supreme Court resulting from this decision is reported at [1987] 2 CLJ at p. 13.]

JUDGMENT

Zakaria Yatim J:

On the application of Mr. Karpal Singh, Counsel for a fugitive criminal of a foreign country, in an extradition proceeding against the fugitive criminal in a Magistrate's Court under the Extradition Ordinance 1958, I agreed to exercise my power of revision under s. 323 of the Criminal Procedure Code. The issue raised in Mr. Karpal Singh's application involves an important question of law relating to a foreign diplomat, who had given evidence in that proceeding but subsequently on the instructions of the Turkish Ministry of Foreign Affairs he did not attend Court for the continued hearing. The facts leading to the hearing of this criminal revision are as follows:

On 21 July 1981 a requisition was made by the Republic of Turkey to extradite the fugitive criminal back to the Republic. On the same date, a special direction was given by the Minister of Home Affairs under s. 3A of the Extradition Ordinance. The fugitive criminal was arrested on 28 July 1986 and extradition proceeding commenced in the Magistrate's Court, Kuala Lumpur on 12 December 1986. On 20 December 1986 the first secretary to the Turkish embassy in Kuala Lumpur, Mr. Tarik Yelvac gave evidence at the request of the defence. The Deputy Public Prosecutor called him to testify at the proceeding and he attended Court that day on the basis of a diplomatic note (P20) dated 19 December 1986. He completed the examination-in-chief and Mr. Karpal Singh had commenced his cross-examination. During his cross-examination on the documents sent by the Turkish government, there was some confusion about the translation. The matter was adjourned to enable the witness to identify the translation with the right documents. On 21 January 1987 when the hearing resumed for Mr. Karpal Singh to continue with his cross-examination, Mr.Yelvac did not turn up in Court. A document dated 19 January 1987 (P21) was produced by the Deputy Public Prosecutor. This document is another diplomatic note sent by the Turkish embassy stating that Mr. Yelvac would not be appearing in Court any more. As a result of this note and Mr. Yelvac's absence, Mr. Karpal Singh applied to the Court to issue a warrant of arrest against Mr. Yelvac to compel him to appear in Court. The Magistrate, after hearing the arguments of both sides gave her ruling on 22 January 1987, that a warrant of arrest could not be issued by virtue of Article 29 as contained in the Schedule to the Diplomatic Privileges (Vienna Convention) Act 1966 (hereinafter referred to as "Vienna Convention Act").

The question that this Court is asked to determine is whether the Magistrate was right in making the ruling that she could not issue a warrant of arrest by virtue of Article 29. This Article, together with the other relevant articles of the Vienna Convention on Diplomatic Relations signed in 1961, are set out in the Schedule to the Vienna Convention Act and have the force of law in this country.

Article 29 which the Magistrate relied upon guarantees that the person of a diplomatic agent shall be inviolable. He is not liable to any form of arrest or detention. Article 1 defines a 'diplomatic agent' as the head of the mission or a member of the diplomatic staff of the mission. Mr. Yelvac is clearly a diplomatic agent within the meaning of the definition, and as such he is entitled to the protection accorded by Article 29.

As a diplomatic agent he enjoys diplomatic immunity from the criminal jurisdiction of our Court. He also enjoys immunity from the Court's civil and administrative jurisdiction except in three specific cases mentioned in Article 31(1). Clause 2 of the same Article provides that, as a diplomatic agent, Mr. Yelvac "is not obliged to give evidence as a witness" in our Court of law or in any tribunal.

The immunity of a diplomatic agent from the jurisdiction of the Court, including immunity from giving evidence as a witness, may, however, be waived by the sending state, which in the present case, is the Republic of Turkey. This is clearly provided in Article 32 as contained in the Schedule of the Vienna Convention Act. The waiver referred to in this Article must always be expressed. (see Clause 2).

Mr. Yelvac gave evidence in the Magistrate's Court on 20 December 1986 on the basis of a diplomatic note (P20). The note explicitly states in the following words:

> Upon the instructions of the Turkish Ministry of Foreign Affairs, with the view to fulfilling the legal requirements of the Malaysian Authorities, **Mr. Tarik Yelvac will be present during the case hearing** of Mr. Orhan Olmez in his capacity as Consul of this Embassy **solely for authentication of the legal documents** prepared and sent by the Turkish Authorities as well as letters, notes and documents sent by this Embassy.
>
> In this connection, during the hearing, Mr. Yelvac will reply only on the questions pertaining to the Authentication of the aforementioned legal documents. Mr. Yelvac will refrain from replying any other questions posed by either the Honourable Magistrate or other persons.
>
> The Embassy of the Republic of Turkey would be grateful if the foregoing is transmitted to the relevant Malaysian Authorities before the hearing.
> [Emphasis added]

It is clear that in this note the Republic of Turkey had expressly waived the immunity of Mr. Yelvac from the jurisdiction of the Court in this country in an express form. The waiver, includes a waiver from immunity not to give evidence as a witness in the extradition proceeding. The waiver is only confined to giving evidence on the authentication of the legal documents used in the extradition proceeding. In my opinion, such waiver is perfectly in order. But the note went on to stipulate conditions that Mr.Yelvac would refrain from replying any other questions posed by the Magistrate or other persons. By "other persons" I take it to include Counsel for the fugitive criminal. In other words, Mr. Yelvac was not to be questioned by the Magistrate, and neither is he to be cross-examined by Counsel for the fugitive criminal.

These conditions are contrary to law and procedure relating to an extradition proceeding in this country. Under s. 9(1) of the Extradition Ordinance, in hearing the extradition proceeding, the Magistrate shall hear the case "in the same manner and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him accused of an offence committed within his jurisdiction and triable by the High Court." In hearing the extradition proceeding the Magistrate has to observe the rules of evidence as laid down in the Evidence Act 1950. The Magistrate is entitled to put any question to the witness to clarify certain matters in his evidence. See s. 425 of the Criminal Procedure Code. See also Mallal's *Criminal*

Procedure, 4th Edn., p. 597. Under s. 138(1) of the Evidence Act witnesses shall be first examined-in-chief, then, if the adverse party so desire, he may be cross-examined. Under the Evidence Act, both the Magistrate and the counsel for the fugitive criminal are entitled in law to question Mr. Yelvac, provided that the questions relate only to the authentication of the documents.

The conditions stipulated in the diplomatic note (P20), that Mr. Yelvac should refrain from replying any questions put by the Magistrate and Counsel for the fugitive criminal, are contrary to our law especially the Extradition Ordinance and the Evidence Act. I accordingly rule that the conditions stipulated in the diplomatic note (P20) do not affect the law and procedure in the extradition proceeding and the Magistrate should ignore these conditions. These conditions are also contrary to the spirit of the Vienna Convention on Diplomatic Relations 1961 to which the Republic of Turkey is a contracting party and also contrary to the rules of international law. A learned and eminent writer on international law, Dr. B. Sen, in his book, *A Diplomat's Handbook of International Law and Practice,* 2nd Edn., at p. 126 states,

> It is of the essence especially in criminal trials that all witnesses are liable to be cross-examined by the opposite party or his lawyer, and this principle, which may be regarded as part of natural justice or fair trial, will be applicable equally to a diplomat who may decide to give evidence in any proceeding before the Courts, Civil or criminal.

In a subsequent diplomatic note dated 19 January 1987 (P21), the embassy of the Republic of Turkey in Kuala Lumpur stated in the following words:

> ... upon the instructions of the Turkish Ministry of Foreign Affairs, **Mr. Tarik Yelvac will not be appearing before the Court again**, in connection with the case hearing of Mr.Orhan Olmez which will be held between 21-24 January 1987.
>
> Since Mr. Yelvac has already appeared in the Court and given evidence as to the authentication of the legal documents prepared and sent by this Embassy, **the relevant Turkish authorities believe that the legal requirements of the Malaysian authorities have already been met.**
>
> The Embassy also **believes that the evidence submitted would be sufficient for Mr.Orhan Olmez's extradition to Turkey.**
> [Emphasis added]

It is not expressly stated in the note that the Republic of Turkey, by stating that Mr.Yelvac would not be appearing before the Court again, was claiming immunity for Mr. Yelvac. But it is implicit from the note that the Republic is claiming immunity. If the Republic was claiming immunity for Mr.Yelvac that he should not appear before the Court again, in my opinion the Republic is not entitled to do so since there is already an express waiver. Dr. B. Sen, in his book (*supra*) at p. 131 states that

> ... once such waiver is made, there would be no question of raising the plea of immunity in a later stage of the proceeding in the suit.

In *Tungku Abu Bakar & Ors. v. Sultan of Johore* [1949] 15 MLJ 187, Gordon-Smith J held that although the Sultan was sovereign, he had waived his immunity by instituting the proceedings in the Japanese Court. The originating summons before the learned Judge was a continuation of the earlier proceedings in the Japanese Court and therefore should continue in view of the waiver. The Court of Appeal confirmed the decision of Gordon-Smith J In his judgment in the Court of Appeal Willian CJ (FM) said,

Accordingly I hold that the Sultan by instituting proceedings in the Japanese Court submitted to the jurisdiction of that Court that by virtue of the Japanese Judgments and Civil Proceedings Ordinance, 1946, the proceedings brought by the Trustees in the High Court of the Colony of singapore are a continuation of the proceedings instituted by the Sultan in the Japanese Court, and therefore the claim by the Sultan of immunity from the jurisdiction of the High Court of the Colony of Singapore fails. [1950] 16 MLJ 3 @ 20.

The decision of the Court of Appeal was subsequently upheld by the Privy Council [1952] AC 318.

With regard to the other part of the diplomatic note (P21), which states that the "evidence submitted would be sufficient for Mr. Orhan Olmez's extradition to Turkey", in my opinion it is the Magistrate who decides whether or not there is a *prima facie* case against the fugitive criminal. If the Magistrate finds that there is a *prima facie* case against him, then she commits him to prison pending his extradition to the Republic of Turkey. See s. 10 of the Extradition Ordinance 1958.

Since there is a waiver, Mr. Yelvac is obliged to attend the Court and continue to give evidence as a witness in the extradition proceeding on the authentication of the documents. In view of the waiver, he is subject to the jurisdiction of the Court to compel a witness to attend Court. The Magistrate can issue a subpoena to compel Mr. Yelvac's attendance in Court on a specified date. If he fails to comply with the subpoena, which is duly served on him, the Magistrate can issue a warrant of arrest against him. Mr. Yelvac is not protected by Article 29 of the Vienna Convention if such warrant of arrest is issued against him, in view of the waiver.

I accordingly order that a subpoena be issued under the provisions of the Criminal Procedure Code to compel Mr.Yelvac's attendance in Court on a specified date. If he fails to attend Court on the date specified in the subpoena, and the subpoena has been duly served on him, then a warrant of arrest will be issued against him. I should mention here that the subpoena should state that Mr. Yelvac is required to attend Court for the purpose of giving evidence on the authentication of the documents only.

Also found at [1987] 2 CLJ 172